APPENDIX A

N.Y. County Clerk's # 570336/93 July 19, 1994
APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT

SEPTEMBER 1993

PRESENT: HON. EDITH MILLER, J.P.
HON. WILLIAM P. McCOOE
HON. KRISTIN BOOTH GLEN
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
- against -
AEROLINEAS ARGENTINAS, #93-257
Defendant-Appellant and
Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Defendant Aerolineas Argentinas appeals from a judgment of the Civil Court, New York County, entered August 26, 1992 after a nonjury trial (Jane Solomon, J.) awarding plaintiff the sum of $41,182.40 upon a recovery of $23,024.90.

PER CURIAM:

Judgment entered August 26, 1992 (Jane Solomon, J.) affirmed, with $25 costs.

Plaintiff Maro Leather Co., a leather importer/finisher, commenced this breach of contract action against defendant airline in July 1985 to recover damages for the loss of two pallets of unfinished leather goods in February 1984 shipped from Argentina to New York. Following a reversal of our prior grant of summary judgment to defendant and reinstatement of the complaint (Maro Leather Co. v. Aerolineas Argentinas, 142 A.D.2d 265, rearg. denied ___ AD2d ___, N.Y.L.J., March 20, 1989, at 22, col. 1), and the completion of certain discovery by defendant

against a nonparty truck carrier concerning the origin of the cargo loss, the trial court awarded plaintiff a total award of $41,182.40, inclusive of prejudgment interest of $17,790 from February 2, 1984, the date of the loss. The principal amount of plaintiff's recovery was $23,024.90 or slightly less than the Warsaw Convention liability limitation of $24,000 (1200 kilograms at $20 per kilogram) [Article 22 of the Convention] [49 Stat. 3000, TS No. 876, reprinted at 49 USCA § 1502].

In awarding prejudgment interest in excess of the Warsaw Convention's total damages limitation, the trial court relied upon the reasoning of Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, 133 Misc.2d 858, emphasizing the compensatory nature of prejudgment interest under New York law (see, CPLR 5001) and the goal of speedy resolution of cargo loss claims. We affirm.

We adopt the Fifth Circuit Court of Appeals' position that prejudgment interest, while not specifically mentioned in the Warsaw Convention, is allowable in a cargo loss case since it speeds settlement and recovery and fully compensates the successful plaintiff for the time value of its money that defendant enjoyed from the delay in payment (Domangue v. Eastern Air Lines, 722 F.2d 256, 263-264 [5th Cir. 1984] [allowing prejudgment interest under the Warsaw Convention on a wrongful death claim]; Boehringer-Mannheim Diagnostics v. Pan Am. World Airways, 737 F.2d 456, 460 [5th Cir. 1984], cert. denied and appeal dismissed 469 U.S. 1186 [1985] [citing *Domangue* in upholding the award of prejudgment interest under the Warsaw Convention in a cargo damage case]; see also, Mahfoud v. Eastern Air Lines, 17 Av. Cas. (CCH) 17,714 [W.D. La. 1984], affd without opinion, 729 F.2d 777 [5th Cir. 1984]. affd by an equally divided court, 474 U.S. 213 [1985] [affirming a grant of prejudgment interest under the Warsaw Convention]; Eli Lilly Argentina, S.A. v. Aerolineas Argentinas, supra, [citing *Domanque* in awarding prejudgment interest under the Convention in a cargo damage case]; 2 Sorkin, Goods in Transit, § 11.07[4][c]).

Here, given the length of time between the cargo loss (1984) and the judgment (1992) [eight years] and the act that defendant's conduct contributed to the delay in resolving this litigation

[Record at 677-678, 1219] (see, Domangue v. Eastern Air Lines, supra, at 264), the award of prejudgment interest in plaintiff's favor was appropriate.

In affirming the determination of the trial court, we decline to follow the contrary holdings of both the Second Circuit in O'Rourke v. Eastern Air Lines, 730 F.2d 842, 851-853 [2d Cir. 1984] [upholding District Court's refusal to award prejudgment interest above aggregate damages limitation under Warsaw Convention on a wrongful death claim stemming from the same disaster that generated the *Domangue* action] and Exim Indus. v. Pan Am. World Airways, 754 F.2d 106, 109 [2d Cir. 1985] [citing *O'Rourke* in upholding a refusal to award prejudgment interest under the Convention in a cargo loss case] and the Seventh Circuit in Deere & Co. v. Deutsche Lufthansa Aktiengesellschaft, 855 F.2d 385 [7th Cir. 1988] [citing *O'Rourke* in reversing an award of prejudgment interest above the aggregate damages limitation of the Convention in a cargo damage case]). We note that our court, as a State court, is not bound under the doctrine of stara decisis by the opinion of these Federal courts (see generally, Pitt v. City of New York, 94 A.D.2d 202, 207, affd 63 N.Y.2d 815).

Turning to defendant's remaining contentions, defendant's August 1989 pre-trial motion to dismiss the complaint based upon the lack of capacity of plaintiff (a New Jersey corporation) to maintain this action under BCL § 1312(1) was properly denied by the court below, following the Appellate Division's reinstatement of the complaint under the governing tariff. A defendant relying upon BCL § 1312(1) has the burden of proving that the foreign corporate plaintiff was "doing business" in New York without authority (Great White Whale Adv. v. First Festival Prods., 81 A.D.2d 704, 706). Specifically, defendant must prove that plaintiff's business activities here were "so systematic and regular as to manifest continuity of activity in the jurisdiction" (Construction Specialties v. Hartford Ins. Co., 97 A.D.2d 808). A determination of whether regular and systematic intrastate activity has been undertaken must inquire into "the type of business activities being conducted" (Van Arx, AG. v.

Breitenstein, 52 A.D.2d 1049, 1050, aff'd 41 N.Y.2d 958). Where a foreign corporation's activities within New York are "merely incidental to its business in interstate and international commerce," BCL § 1312(a) is not applicable (Alicanto, S.A. v. Woolverton, 129 A.D.2d 601, 603; see also, Storwal Intl. v. Thom Rock Realty Co., 784 F.Supp. 1141, 1144 [S.D.N.Y. 1992]).

Significantly, the "doing business" standard under BCL § 1312(a) requires a greater amount of local activity by a foreign corporation than the "doing business" standard applicable under New York's long-arm statute [CPLR 302] relating to personal jurisdiction (Colonial Mtge. Co. v. First Fed. Sav. & Loan Assn., 57 A.D.2d 1046, 1047; Annotation, "Closed Door" Statutes, 88 A.L.R. 4th 466, 485, § 6[a]. In the context of BCL § 1312(a), a foreign corporation bringing suit in New York is presumed to be doing business in its state of incorporation and not in New York (Alicanto, S.A. v. Woolverton, supra, at 602; Great White Whale Adv. v. First Festival Prods., supra, at 706). The statute is a "revenue measure, designed to place foreign corporations on an equal footing with domestic [corporations]" (Siegel, N.Y. Prac., § 30 at 32 [2d ed.]). Its purpose is not to enable a defendant to avoid contractual obligations (Van Arx, AG. v. Breitenstein, 41 N.Y.2d at 960). Noncompliance with the registration and taxation requirements of BCL § 1312(a) does not raise a jurisdictional bar and is curable during the pendency of the action (Intermar Overseas v. Argocean, S.A., 117 A.D.2d 492, 497).

On this record, defendant failed to meet its burden of proving that at the time of the 1984 contract of international air carriage, plaintiff conducted systematic and regular business activities here essential to its corporate business. Notably, the mere solicitation of sales in New York and placement of orders do not constitute doing business in the State within the meaning of BCL § 1312[a] (Sirois Leather v. Lea-Suede Corp., 44 A.D.2d 815; Librairie Hachette, S.A. v. Paris Book Center, 62 Misc.2d 873, 875; 14 N.Y. Jur.2d, Business Relationships, §§ 470, 479). The cases relied upon by defendant (see, United Arab Shipping Co.

v. Al-Hashim, 176 A.D.2d 569, appeal dismissed 79 N.Y.2d 1038, appeal dismissed 80 N.Y.2d 923; Parkwood Furniture Co. v. OK Furniture Co., 76 A.D.2d 905; Conklin Limestone Co. v. Linden, 22 A.D.2d 63; Paper Mfrs. Co. v. Ris Paper Co., 86 Misc.2d 95) involve foreign corporations whose intrastate activities were of a "regular, systematic, extensive and continuous nature," not proven in this case.

Nor did the court below abuse its discretion in rejecting defendant's dilatory efforts to conduct discovery on this issue on the eve of trial (see generally, Dunsmore v. Paprin, 114 AD2d 836). Defendant offered no reasonable excuse nor special circumstances warranting that relief. This action had been pending for several months following reinstatement of the action and plaintiff's subsequent response to a CPLR 3123 notice to admit that it was "doing business" in New Jersey as a leather importer (Record at 277). Nevertheless, defendant did not seek to depose plaintiff concerning the nature and level of plaintiff's business activity here (see generally, Fine Arts Enters., N.V. v. Levy, 149 A.D.2d 795, 796). Although defendant ultimately completed its own investigation in October 1989, defendant failed to ascertain such pivotal factors as the volume of plaintiff's sales within New York, both in number and dollar amounts (Reese v. Harper Surface Finishing Sys., 129 AD2d 159, 165; Peter Matthews, Ltd. v. Robert Mabey, Inc., 117 AD2d 943, 944; Parkwood Furniture Co. v. OK Furniture Co., supra). We further note that soon after plaintiff's filing of a notice of trial and certificate of readiness, defendant had indicated in May 1989 that it had no desire for further discovery, other than to depose plaintiff's New Jersey truck carrier as to the circumstances of the delivery of the airport shipment (Record at R139).

This constitutes the decision and order of the court.

I concur EM I concur WM I concur KBG

APPENDIX B

Findings of Fact

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK : TRIAL TERM : PART 9

MARO LEATHER CO.,
Plaintiff
- against -
AEROLINEAS ARGENTINAS, INDEX NO. 48027/85
Defendant and Third-
Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

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111 Centre Street
New York, New York
February 25, 1991

BEFORE:

HONORABLE JANE S. SOLOMON, Justice

APPEARANCES:

DONOVAN, PARRY, WALSH & REPETTO
BY: PAUL H. MURPHY, ESQ.
MICHAEL J. RANT, ESQ.
(For the Plaintiff)
BIGHAM, ENGLAR, JONES & HOUSTON
BY: EDWARD SADOWSKY, ESQ>
(For the Defendant)

* * * * *

THE COURT: Gentlemen, I am not going to delay this any further.

As for findings of fact here almost everything is conceded and that is that the plaintiff ordered from Argentina nine pallets

of leather. They were flown to the metropolitan area, Kennedy, by the defendant. They were then placed in a warehouse which was the defendant's or that of the defendant's agent and then the plaintiff sent its agent the trucker Mr. Lueddeke to get the final pallets. He went on both February 1, 1984 and February 2, 1984. By the records of the defendant or its agent several pallets were picked up and I refer everybody to what is exhibit six in evidence at the trial here which has 2/1/84 and is circled three and 2/2/84 and circled four and I refer everybody to exhibit five which has a very clearly circled seven of nine on the Aerolineas tally sheet, a marking that I think says, "not locate two pieces on 2/2/84", and on the lower right side markings suggesting that rather than seven, nine pieces were picked up. We have Mr. Lueddeke's signature twice and a three next to one of his signatures and a four next to the other.

We have something else that then said four pieces and as far as I am concerned, it appears Lueddeke initialed three and then he initialed four and the odd four pieces in a circle has to do with something else. This piece of paper is totally inconsistent with eleven pieces which were its subject having been signed for on it.

I recognize that reasonable people could disagree and reasonable people in disagreeing might also rely on Exhibit 7 or 7-A, whichever form you like to look at, to Exhibit 12, namely, the better and worse copies of what appear to be several slips of paper produced by Mr. Lueddeke who seems to be a thoroughly disagreeable human being and who confounded the nature of this matter, making it more disagreeable, but I am not at all persuaded that there is anything in evidence which makes him a liar and unworthy of belief and I hold that the plaintiff has proved that its agent Mr. Lueddeke only got seven of the nine pallets within the burden of proof that it has to meet here.

The question of whether the defendant is responsible for the shortage is resolved against the defendant because its own documents which support the notion that only seven pieces were picked up and all nine were apparently received by it. That leaves only the question of whether or not interest should run in excess of a total judgment amount of twenty-four thousand dol-

lars which is what The Warsaw Convention would permit from after, I guess, February 6, 1984, and I think since while almost all the cases were given to me in Xerox form by each of the lawyers when we last met the formal memorandum of it was not given to me until this morning.

I suggest, in order to lance [*sic*] this problem, is if Mr. Sadowsky could tolerate the thought that we break for lunch. If you need a pass to go to our library on the tenth floor if you don't have all the cases here or anything else that you want, that we reconvene at about two and see if we can't make a ruling on the record which will put this case to bed.

MR. SADOWSKY: I am prepared to argue it now.

THE COURT: Go ahead.

MR. MURPHY: Your Honor, in the memorandum submitted to you in the cases we all understand that there is two lines of thoughts, or I should say, there are two ways the decisions have gone.

There are certain cases that have held in the Warsaw case and I note I think principally those are personal injury cases involving something called The Montreal Agreement which is a bilateral agreement among airlines. It is not, per se, The Warsaw Convention. I raise it in all respects. I don't know that it is a definitive difference and I am not suggesting the cases would not be applicable. I just point it out.

Your Honor, this case cries out for the award of interest. I have been trying to resolve this case since 1985. It is a February 1984 loss.

As Your Honor knows, because unfortunately through some of the motions that came down the pike in this case there have been any number of tangential motions which have effectively delayed today's day of reckoning for four or five years.

THE COURT: I will tell you and Mr. Sadowsky now that I agree with you; that if any case cries out for the award of interest and the notion that a defendant should not be able to hide behind The Convention to defend the lawsuit so that recovery is totally negated, this is it. By what authority may I say that The Convention doesn't apply?

MR. MURPHY: The question discussed last time included whether this court must follow the Second Circuit instruction and that decision did in fact rule that interest would not be allowed.

THE COURT: It is a property damage, not an injury case because I frankly believe you could say that personal injury cases have a cap and interest couldn't possibly run because you don't know what it would run on until you had a jury award. These are different. We all know what it would be applied to. Why is the Civil Court decision of 1986, which nobody appealed, more binding on me or persuasive for your purposes than the Second Circuit decision which proceeded [*sic*] it and which also is a property damage case?

MR. MURPHY: I think the answer is, Your Honor, as I understand the law as set forth in my memorandum, this Court is not bound to follow Second Circuit. It may look to any federal court for guidance, but not need follow any decision but for a decision of the United States Supreme Court.

As we pointed out in our memorandum of law, this issue has only been before the United States Supreme Court once. Unfortunately for all of us, and I mean that sincerely, it was a binding precedential judgment from the Supreme Court, but in that one instance where the issue was before The Supreme Court it affirmed the granting of interest, so to the extent that that is guidance from The Supreme Court and as best as my research has disclosed that is the only time The Court has had the issue before it, Your Honor. The Supreme Court has affirmed it, the award of interest and again, as I say, there is nothing that I can understand or have seen in the law that compels this court to follow The Second Circuit.

As is The Fifth Circuit, this court can look for guidance to either circuit or any Federal Court without being compelled to hold it against The Court's own inclinations.

MR. SADOWSKY: I ask The Court to pay judicial notice of The Warsaw Convention title 49 section 1502, and I have a copy of it for you, if The Court would like to see it.

The purpose of The Warsaw Convention was to establish a sense of stability when The Warsaw Convention was promulgat-

ed many, many years ago. The Warsaw Convention did not address the issue of pre-judgment of interest as it felt that without having interest airlines and air carriers would be more disposed to settling their cases. The United States is a signatory to this Warsaw Convention and this is the supreme law of the land as a treaty of The United States as ratified by the congress and signed by the president. Whether we like it or not, state courts must abide by this precedent in the nature of the statute, in the nature of the *Deere* case and *O'Rourke* and other authorities which my opposing counsel has cited.

Why did the writers of this convention not include interest? Because they realized on a very scholarly level that interest would only impede settlement in cases and I mean this sincerely, Your Honor, contrary to the statements made by my opposing counsel that this case is dragged out. I can assure you that if it has taken as long as it has it was because of the complexity of the case, the numerous notices to admit, depositions, motions, any continuances in this case I have granted to my opposing counsel.

THE COURT: We are not faulting Mr. Murphy or myself in agreeing with this motion that this case has taken a long time. We are faulting you.

You don't have to defend yourself. Let's go.

MR. SADOWSKY: The *Eli Lily versus Aerolineas Argentinas* from Judge Shirley Fingerhood of this courthouse, in my shepardizing this case it has only been cited once as precedent and that was in a footnote in another case in which it was not relied upon that judgment interest in Warsaw Convention case was applicable.

I would respectfully say to a judge of this court that this particular opinion is not of precedential value and I ask The Court not to follow it.

The case in which this Eli Lily case is referred to is the *Floyd versus Eastern Airlines* case of the Eleventh Circuit.

THE COURT: That is a personal injury case.

MR. SADOWSKY: If I recall, yes.

I would ask The Court to not follow this *Eli Lily* case as I do not think, and I say this as an officer of the court, that it is

good law. It has not been followed by any single state court in a Second Circuit or cited with approval. I think it is vulnerable to attack. Perhaps in today's mode of transportation the Warsaw Convention should be modified or changed in some way, but that scenario is not presented to this court. We can only go by what The Warsaw Convention says.

There is no indication that interest is applicable and I would advise that interest should be denied.

Thank you, Your Honor.

THE COURT: On this issue I am ruling in favor of the plaintiff and the following decision and the reasoning of Judge Fingerhood in *Eli Lily against Aerolineas Argentinas* which is reported as given to me at Aviation Reporter seventeen thousand nine sixty-nine, according to that Xerox; also at 508 N.Y. Supp. 2nd 865, a November 12, 1986 decision of this Court seems to me that if you are concerned about what everyone says the Warsaw Convention is concerned about, namely, the fixed liability of a defendant, we know that the statutory interest rate rarely changes and if it does everybody knows about it and in New York State it is nine percent. That interest rate should run from February 2nd, the date provided when I was grasping for the date, as opposed to the month, by the attorney for the defendant.

I want to be perfectly clear. There seems to be no dispute among the parties that the sums sought by the plaintiff of liability is the dollar amount of twenty-three thousand twenty-four dollars and ninety cents, an amount being less than whatever the proper calculation under the Warsaw Convention would be.

Accordingly, the plaintiff may have judgment for twenty-three thousand twenty-four dollars and ninety cents with interest to [*sic*] the statutory rate from February 2, 1984.

It is so ordered.

Judgment

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO., Plaintiff, - against - AEROLINEAS ARGENTINAS, Defendant and Third-Party Plaintiff, - against - TRANS WORLD AIRLINES, INC., Third-Party Defendant	Index No. 48027/85 Judgment Rendered in Favor of Maro Leather Co., Plaintiff, Residing at 825 Broadway, Newark, New Jersey 07104

Amount awarded after Trial		$23,024.90
Interest 9% from 2/2/84		17,790.00
Total		$40,814.90
Costs by Statute	300.00	
Service of summons and complaint		
Filing of summons and complaint	20.00	
Prospective Marshal's Fee	22.50	
Filing of Notice of Trial	25.00	
Jury Fee	N/A	
Total		$41.182.40

STATE OF NEW YORK, COUNTY OF NEW YORK

The undersigned, attorney at law of the State of New York one of the attorney(s) of record for the plaintiff(s) in the above entitled action, states that the disbursements above specified have been or will necessarily be made or incurred therein and are reasonable in amount.

That a decision has been rendered after trial in favor of the plaintiff(s) and against defendant, Aerolineas Argentinas.

The undersigned affirms this statement to be true under the penalties of perjury.

Dated: New York, New York
July 22, 1992

Matthew S. Schorr
Matthew S. Schorr

Judgment entered on AUG 26 1992.

The summons and complaint in this action having been served on AEROLINEAS ARGENTINAS, the defendant(s) herein on the 22nd day of July 1985 and the judgment rendered in favor of plaintiff(s) against said defendant(s) Aerolineas Argentinas after trial before Judge Jane S. Solomon on the 25th day of February 1991.

Now, on motion of Donovan Parry Walsh & Repetto, attorney(s) for the plaintiff it is,

ADJUDGED that MARO LEATHER CO. plaintiff(s) residing at 825 Broadway, Newark, New Jersey 07104, recover(s) of AEROLINEAS ARGENTINAS, defendant(s), residing at 9 Rockefeller Plaza, New York, defendant(s) the sum of $23,024.90 with interest of $17,790.00 making a total of $40,814.90 together with $367.50 costs and disbursements, amounting in all to the sum of $41,182.40 and that plaintiff(s) have execution therefor.

Jack Baer, Clerk
Entered per instructions of M. Pickens

APPENDIX C

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 13th day of October, 1994.

Present: Hon. EDITH MILLER, J.P.
Hon. WILLIAM P. McCOOE
Hon. KRISTIN BOOTH GLEN, *Justices.*

MARO LEATHER CO.,
Plaintiff-Respondent, 570336/93
- against -
AEROLINEAS ARGENTINAS, *Order upon motion.*
Defendant-Appellant and
Third-Party Plaintiff, cal #93-257
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

The above named appellant having by notice of motion dated the 8th day of August 1994 moved for an order granting reargument, or in the alternative, for leave to appeal to the Appellate Division - First Department from an order of this Court dated July 19, 1994.

Now upon reading and filing said notice of motion and the affidavits of Paul Ambos verified the 8th day of August 1994 and the 22nd day of August 1994 and the papers annexed in favor of said motion, and the affidavit of Paul H. Murphy verified the 16th day of August 1994 in opposition thereto,

IT IS ORDERED that the said motion be and the same hereby is DENIED.

Enter,

[signature illegible]
Justice Appellate Term

APPENDIX D

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the Couty of New York, entered on December 13, 1994

Present -- Hon. Betty Weinberg Ellerin,
Richard W. Wallach
Sidney H. Asch
Eugene Nardelli
Peter Tom,

MARO LEATHER CO.,
Plaintiff-Respondent,
- against -
AEROLINEAS ARGENTINAS, M-5609
Defendant-Appellant and
Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Defendant-appellant Aerolineas Argentinas having moved for leave to appeal to this Court from the order of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on July 19, 1994,

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

Enter:

David Spokony
Deputy Clerk

APPENDIX E

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO.,
Plaintiff,
- against -
AEROLINEAS ARGENTINAS,
Defendant and
Third-Party
Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party
Defendant.

NOTICE OF APPEAL

Index No. 48027/85

Defendant-appellant, relying upon the question directly involving the construction of the provisions of Article VI, Clause 2 of the Constitution of the United States, hereby appeals as of right to the Court of Appeals of the State of New York from the order of the Appellate Division of the Supreme Court of the State of New York, First Department, entered in the office of the Clerk of the Appellate Division on December 13, 1994, which unanimously denied leave to appeal from the decision-order of the Appellate Term of the Supreme Court of the State of New York, First Department, entered therein on July 19, 1994, which unanimously affirmed a judgment of the Civil Court of the City of New York, County of New York (Jane Solomon, J.) entered in the office of the Clerk of the Court on August 26, 1992 in favor of plaintiff and against defendant in the amount of

$40,814.90 inclusive of prejudgment interest and costs, and defendant appeals from each and every part of said order of the Appellate Division and from the whole thereof.

Dated: New York, New York
December 19, 1994

Bigham Englar Jones & Houston
Attorneys for Defendant-Appellant
14 Wall Street, 22nd Floor
New York, New York 10005
(212) 732-4646

To: Donovan Parry Walsh & Repetto
Attorneys for Plaintiff-Respondent
161 William Street
New York, New York 10038
(212) 964-3553

APPENDIX F

State of New York,
Court of Appeals

At a Session of the Court, held at Court of Appeals Hall in the City of Albany on the fourteenth day of February 1995

Present, Hon. Judith S. Kaye, *Chief Judge, presiding*

Mo. No. 200 SSD 6
MARO LEATHER CO.,
Respondent,
v.
AEROLINEAS ARGENTINAS,
Appellant,
v.
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

The appellant having filed notice of appeal in the above title and due consideration having been therupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the Court does not have jurisdiction to entertain the appeal (NY Const, art. VI, sec. 3; CPLR 5601).

Donald M. Sheraw
Donald M. Sheraw
Clerk of the Court

APPENDIX G

Order

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 20, 1988.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, Justices.

Maro Leather Co.,
Plaintiff-Appellant,
-against-
Aerolineas Argentinas, 34857
Defendant-Respondent
and Third-Party Plaintiff,
-against-
Trans World Airlines, Inc.,
Third-Party Defendant.

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Appellate Term of the Supreme Court, First Department, entered on or about October 21, 1987, which reversed an order of the Civil Court, New York County (Emily Goodman, J.), entered on September 23, 1986 and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint,

And said appeal having been argued by Paul H. Murphy of counsel for appellant, and by Paul Ambos of counsel for defendant-respondent and third-party plaintiff; and due deliberation having been had thereon, and upon the Opinion of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same hereby is reversed, on the law, and the judgment of the Civil Court reinstated. Appellant shall recover of defendant-respondent and third-party plaintiff $75 costs and disbursements of this appeal.

Enter:

Francis X. Galdi
Deputy Clerk

Decision

SUPREME COURT APPELLATE DIVISION
First Department, October 1988

Dec 20, 1988

Francis T. Murphy, P.J.
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, JJ.

Maro Leather Co.,
Plaintiff-Appellant,
against
Aerolineas Argentinas, 34857
Defendant-Respondent
and Third-Party Plaintiff,
against
Trans World Airlines, Inc.,
Third-Party Defendant.

Appeal by the plaintiff-appellant from an order of the Appellate Term, First Department, entered on October 21, 1987, which reversed an order of the Civil Court, New York County (Emily Jane Goodman, J.), entered September 23, 1986 and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint.

Paul H. Murphy, of counsel (Joseph A. Scalzo with him on the brief; Donovan, Maloof, Walsh & Repetto, attorneys) for plaintiff-appellant

Paul Ambos, of counsel (Walsh and Levine, attorneys) for defendant-respondent and third-party plaintiff

ASCH, J.

Plaintiff Maro Leather Co., an importer, was the consignee of nine pallets of unfinished leather from Argentina. The complete shipment of nine pallets was manifested aboard defendant

Aerolineas Argentinas' flight 310 of January 29, 1984 from Buenos Aires to New York. Aerolineas' Delivery Tally, dated February 2, 1984, reflected that only seven of the nine pallets were delivered to plaintiff's agent. The tally also showed that the delivery was made in two lots of three and four pallets, respectively.

On February 10, 1984, plaintiff's freight forwarder, Trans World Shipping Corp., filed a notice of claim with Aerolineas for the loss of the two pallets. Aerolineas did not pay the claim and plaintiff commenced this action seeking $23,024.90, the value of the two missing pallets. Defendant answered and asserted, *inter alia*, the affirmative defense that it was not liable to plaintiff because the notice of claim was not filed within the applicable time period.

It is undisputed that the Convention for the Unification of Certain Rules Relating to International Transportation by Air ("Warsaw Convention") (49 USC § 1502) applies. Article 16 of that Convention provides:

> (1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.
>
> (2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.
>
> (3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.
>
> (4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

The Convention imposes no notice requirement on a shipper whose goods are lost or partially lost.

Defendant's Cargo Tariff Rule No. 23 and the terms and conditions of the contract of carriage (air waybill), which are substantially the same, also set out the rights of the parties.

The pertinent part of defendant's Cargo Tariff Rule No. 23 provides:

> No action shall be maintained in the case of damage to or partial loss of cargo unless a written notice, sufficiently describing the cargo concerned, the approximate date of the damage, and the details of the claim is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the cargo is placed at the disposal of the person entitled to delivery of the consignment, and in the case of loss (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

The terms and conditions of the contract of carriage set out in the air waybill state in pertinent part:

> No action shall be maintained in the case of damage to goods unless a weitten [*sic*] notice, sufficiently describing the goods concerned, the approximate date of the damage, and the details of the claim, is presented to an office of Carrier within 7 days from the date of receipt thereof, in the case of delay, unless presented within 14 days from the date the goods are placed at the disposal of the person entitled to delivery, and in the case of lass [*sic*] (including non-delivery) unless presented within 120 days from the date of issue of the air waybill.

Plaintiff's claim was filed eight days after February 2, 1984, the date of receipt of seven of the nine pallets.

The Civil Court found that short delivery under the facts of this case constituted "loss" as opposed to "partial loss" and ruled that the 120-day notice period was applicable. Accordingly, it granted plaintiff's motion for partial summary judgment dismissing defendant's first affirmative defense.

Appellate Term viewed the delivery of only seven of nine pallets as partial loss of a total shipment, in accordance with its prior decision in *Leather's Best, Inc. v Aerolineas Argentinas* (136 Misc2d 797). It consequently applied the seven-day period and granted summary judgment in favor of defendant, dismissing the complaint.

The issue, simply put, is whether the loss of two pallets from a total shipment of nine pallets would constitute a "partial loss" to activate the seven-day notice provision of the defendant's tariff or a "total loss" of part of the shipment allowing the application of the 120-day notice provision of the tariff.

The Appellate Term of this Department, in a well-reasoned decision in *Leather's Best, Inc. v Aerolineas Argentinas* (*supra*), construed identical tariff provisions in a case where one of a shipment of three pallets of leather was lost. In finding the seven-day notice provision applied, that court held in pertinent part:

> The loss of 1 of the 3 pallets of a shipment constitutes a "partial loss" of a total shipment, not a total loss of part of the shipment within the meaning of defendant's tariff. Thus, the "partial loss" aspect of the notice of claim provision controls this transaction (*Travelers Indem. Co. v Alia Airlines*, 18 Av Cas 17, 687, *affd without opn* NYLJ, Apr. 4, 1985, at 6, col 1 [App Term, 1st Dept] [seven-day notice of claim "partial loss" provision applied to loss of 2 of 8 packages of microfilm equipment under identical tariff rule]).
>
> Significantly, in cases of "damage to or partial loss" of cargo, unlike the case of a total loss where no shipment ever arrives (a total failure to deliver) (*see*, 17 NY Jur 2d, Carriers, §320; *D'Arsi v Navigazione Alta Italia*, 91 Misc 10 (App Term, 1st Dept), *affd* 173 App

> Div 963), the consignee is immediately aware of the carrier's breach and, thus, the short notice of claim requirement should not be relaxed.
>
> Here, plaintiff consignee clearly was on notice that 1 pallet was missing as evidenced by the notation on the trucker's receipt and the description of the shipment as consisting of 3 pallets, packages or pieces (*see*, 1 Sorkin, How to Recover for Loss or Damage to Goods in Transit § 7.24 [3], at 784, n 49 [1986]). None of the documents describe the portion of the cargo delivered as a "part shipment," inducing plaintiffs to believe that the delivery of the remaining pallet and full satisfaction of the contract was imminent.

Leather's Best, Inc. v Aerolineas Argentinas, supra, at 799-800.)

However, this reasoning ignores the dichotomy set forth in defendant's tariff (and air waybill) between "damage to or partial loss of cargo" and "loss (including non-delivery)". The first category deals with claims for "damage" to goods delivered or "partial loss" of goods delivered, i.e., pilferage of some or all of the contents. As to this "partial loss", the seven-day notice provision applies since the carrier can undertake a prompt investigation. Further, since the goods are in the possession of the consignee, it can make a prompt inspection to determine if there is any damage or if there are any missing items in the shipment. However, when cargo is not delivered, we are faced with the second category of "loss (including non-delivery)", even when we are dealing, as here, with separate, discrete pieces of a single shipment which have not been delivered.

Judge Weinstein of the Eastern District of New York, in a scholarly decision in *Denby v Seaboard World Airlines, Inc.* (575 F Supp 1134, *revd on other grounds* 737 F2d 172), traced the history of article 26 of the Warsaw convention, its construction and the reasons for the notice provisions. While not raised by plaintiff herein, the court in *Denby* noted that the Convention, while establishing a notice provision for damaged delivered

goods, omitted a notice provision for lost or destroyed goods and baggage (*see* art 26, *supra*). However, the courts have consistently allowed carriers to fix some definite notice period after which the shipper may no longer assert the carrier's liability for the loss (*see*, *Denby v Seaboard World Airways*, *supra*, at 1138, and cases cited thereat).

Chief Judge Weinstein discussed the equation of partial loss of the contents of a piece of luggage (or container) with the "damage" called for in article 26 of the Warsaw Convention and then adopted the reasoning of *Fothergill v Monarch Airlines, Ltd.* (2 Lloyd's L.R. 295 [H.L.]). In that case an airline passenger filed a claim promptly for damage to his luggage, i.e., a split seam and a broken lock, but did not file a timely claim for articles he later found missing from the baggage. The House of Lords held that this partial loss of contents of the baggage *was* damage within the meaning of article 26 and, therefore, a timely claim for the lost articles was needed.

> Theoretically, the concept of "damage" as defined by the House of Lords could be extended to include any kind of shortage, as for example, when only one carton in a shipment of ten is delivered. This broader concept of damage was apparently the basis of the decision by the Supreme court of the Netherlands in *Affretair v. V O B*, Judgment of Feb. 12, 1982, RW 1982,50, where there was a short delivery of three packages out of twenty. The decision is cogently criticized by one commentator, partly on the ground that in *Affretair*, the short number of packages was visible on a single count, while in *Fothergill*, it was not immediately apparent that any items were missing from the suitcase. Note, *Supreme Court of the Netherlands: Affretair v. V O B or Fothergill's Dutch Treatment*, 7 J.Air L. 173, 176 (1982). As the author put it:
>
> > The present decision is more than an affirmation of the ruling of the House of

> Lords, which in fact dealt with a case of partial *loss of contents of* a suitcase and not with what Manckiewicz (sic) has described as 'partial loss *stricto sensu*', *viz.*, the loss of one or more packages/ suitcases carried under one air waybill/ baggage check.

Id. at 176 (citation omitted, emphasis in original).

> This distinction is the one we adopt. Loss of one or more whole packages whether cartons, loose pieces, suitcases or containers -- may need no written notice. But delivery of a package or container with part of its contents missing is damage and requires notice as held in *Fothergill*. *See, e.g., Hartford Fire Insurance Co. v Aerolineas Argentinas*, 16 Avi. 17,940 (N.Y. App. Term 1981) (relying on *Fothergill* to require timely notice of damage for carton delivered short in weight).

(*Denby v Seaboard World Airlines, Inc. supra*, at 1141.)

Further, while reversing the District Court on other grounds and noting that "we agree with much of Chief Judge Weinstein's scholarly opinion", Judge Friendly of the Second Circuit, in yet another scholarly opinion, noted the general rule that ambiguities in a filed tariff are to be construed against the carrier (*Denby v Seaboard World Airlines, Inc.*, 737 F2d 172, 187). In summary, "loss (including non-delivery)" of an entire container or pallet must be distinguished from pilferage or theft from a sealed container. The former is readily brought to the carrier's attention, just as if the whole shipment were lost, when the consignee does not receive delivery of all goods on the manifest. The latter loss from theft, etc., however, is not readily noticeable and requires prompt notification to ensure investigation.

As indicated above, defendant's delivery tally reflected that only seven of the nine pallets were delivered to plaintiff's agent. It also noted that delivery was made in two lots of three and four

pallets and bore the further notation "N/L 2 pcs". Thus, non-delivery was not only readily apparent, but noticed, in this case. Accordingly, the 120-day notice period provided for in the case of "loss (including non-delivery)" applies.

Accordingly, the order of the Appellate Term, First Department, dated October 21, 1987, which reversed the order of the Civil Court, New York County (Emily Jane Goodman, J.), entered September 23, 1986, and granted summary judgment in favor of defendant Aerolineas Argentinas dismissing the complaint of plaintiff Maro Leather Co., should be reversed, on the law, and the judgment of the Civil Court reinstated, with costs and disbursements payable by defendant.

All concur.

Order filed.

APPENDIX H

Order

At an Appellate Term of the Supreme Court, first department, held at the Court House, Borough of Manhattan, City of New York, on the 21st day of October, 1987

PRESENT: HON. THOMAS J. HUGHES, P.J.
HON. STANLEY PARNESS
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
-against-
AEROLINEAS ARGENTINAS,
Defendant and Third
Party Plaintiff-Appellant,
-against-
TRANS WORLD AIRLINES, INC.,
Third Party Defendant-
Respondent.

County Clerk's No. 92300/1987

Cal. No. 87-103

May 1987 Term

An appeal having been taken to this court by defendant from an order of the Civil Court of the City of New York, County of New York entered on the 23rd day of September 1986 and the said appeal having been heard and due deliberation having ben had thereon,

IT IS ORDERED AND ADJUDGED, that the order so appealed from be and the same is hereby reversed, with $10 costs, plaintiff's motion for partial summary judgment denied, and summary judgment granted in favor of defendant dismissing the complaint.

Enter,

[signature illegible]
Justice Appellate Term
Supreme Court, first dept.

Decision

APPELLATE TERM OF THE SUPREME COURT,
FIRST DEPARTMENT

MAY 1987

PRESENT: HON. THOMAS J. HUGHES, P.J.
HON. XAVIER C. RICCOBONO
HON. STANLEY PARNESS
Justices.

MARO LEATHER CO.,
Plaintiff-Respondent,
-against-
AEROLINEAS ARGENTINAS, #87-103
Defendant and Third
Party Plaintiff-Appellant,
-against-
TRANS WORLD AIRLINES, INC.,
Third Party Defendant-
Respondent.

Defendant appeals from an order of the Civil Court, New York County, entered September 23, 1986 (Emily J. Goodman, J.) which granted partial summary judgment in favor of the plaintiff and struck defendant's first affirmative defense.

PER CURIAM:

Order entered September 23, 1986 (Emily J. Goodman, J.) reversed, with $10 costs, plaintiff's motion for partial summary judgment denied, and summary judgment granted in favor of defendant dismissing the complaint.

Plaintiff sues in this action for damages sustained upon defendant's failure to deliver two of nine pallets of unfinished leather shipped from Argentina to New York as a consolidated shipment under a single air waybill. The defendant airline's tariffs provide that in the case of a "partial loss" of cargo, notice of claim must be made within seven days of receipt, whereas in the case of total loss, notice must be given within 120 days. In

an identical fact pattern, this court has recently concluded that the loss of one of a number of pallets constitutes a partial loss of the total shipment, not a total loss of part of the shipment, within the meaning of defendant's tariff (Leather's Best Inc. v. Aerolineas Argentinas, NYLJ, September 8, 1987, p. 14, c. 4). Accordingly, since it is undisputed that plaintiff did not file written notice of claim within seven days from the date of receipt of a portion of the cargo, summary judgment must be granted in favor of defendant dismissing the complaint.

I concur TJH
I concur SP

APPENDIX I

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK
SPECIAL TERM, PART I

Index No. 48027/85
Motion Cal. No. NP 24 of 7/28/86

MARO LEATHER CO.,
Plaintiff
- against -
AEROLINEAS ARGENTINAS,
Defendant and Third-Party Plaintiff,
- against -
TRANS WORLD AIRLINES, INC.,
Third-Party Defendant

Present:
Hon. Emily Jane Goodman
Judge

Plaintiff-consignee moves for an order granting it partial summary judgment striking the defendant and third party plaintiff's first affirmative defense.

Plaintiff-consignee instituted this action to recover the sum of $23,024.90 for non-delivery of two pallets of leather goods shipped with the defendant common carrier airline "Aerolineas" from Argentina to New York under its master air waybill 044-2400-2532 and House Air Way Bill Number, both dated January 27, 1984. According to the waybills 9 pallets were listed for delivery but only 7 arrived at the destination and were delivered to plaintiff on February 2, 1984

Defendant Aerolineas interposed an answer containing denials and five complete affirmative defenses.

In the first affirmative defense, the subject of attack here, Aerolineas alleged it is not liable because plaintiff failed to file a written Notice of Claim within the 7 day time limit set forth in Aerolineas tariffs on file with the United States Civil Aeronautics Board and the Warsaw Convention.

A review of the papers reveals plaintiff-consignee filed a proof of loss with Aerolineas on February 10, 194, eight (8) days after the short delivery of leather. Plaintiff takes the position the non-delivery 120 day limitation in the Aerolineas tariff governs and that it has filed its notice in time.

Defendant contends that its first affirmative defense is viable because the plaintiff's Notice of Intention to File a Claim was not timely because it was not filed within 7 days, the time prescribed in instances where only partial delivery was made.

The pivotal question is whether the claim is a partial loss or a loss, including non-delivery. If the claim is properly designated a partial loss, the notice of claim must be filed within 7 days. If the claim is designed a loss, including non-delivery, the notice must be filed within 120 days.

A review of the authorities reveals that under the circumstances that obtain in this case the trend has been to designate the short delivery as a "loss" rather than a partial loss. See *Siemens Corporation* v. *KLM Royal Dutch Airlines*, 19 Avi. 18,502-18,504 Commerce Clearing House Aviation Law Reports; *Leather's Best, Inc.* v. *Aerolineas Argentinas*, 19 Avi. 18,227, 500 NYS 28 492 (N.Y.C. Civ. Ct. 1986).

Accordingly, this court finds this to be a loss of two pallets; therefore the 130 day limit applies because the notice of loss was filed well before that deadline.

The motion is granted and the first affirmative defense is stricken.

Dated: 9/17, 1986

EJG
J.C.C.

APPENDIX J

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on March 16, 1989.

Present - Hon. Francis T. Murphy, Presiding Justice
Joseph P. Sullivan
Sidney H. Asch
Ernst H. Rosenberger
Richard W. Wallach, Justices.

Maro Leather Co.,
Plaintiff-Appellant,
-against-
Aerolineas Argentinas,
Defendant and Third-Party
Plaintiff-Respondent,
-against-
Trans World Airlines, Inc.,
Third-Party Defendant-
Respondent.

M-326
[34857]

Defendant/third-party plaintiff-respondent having moved for reargument or, in the alternative for leave to appeal to the Court of Appeals from, the order of this Court entered on December 20, 1988,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion be and hereby is denied, in its entirety, with $10 costs.

ENTER:

FRANCIS X. GALDI
Deputy Clerk

APPENDIX K

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

Index No.

MARO LEATHER CO.,
Plaintiff(s)

against

AEROLINEAS ARGENTINAS
Defendant(s)

SUMMONS
Plaintiff's Residence Address: 825 Broadway, Newark, New Jersey 07104
The basis of the venue designated is: Defendant's Place of Business

To the above named defendant(s)

You Are Hereby Summoned to appear in the Civil Court of the State of New York at the office of the Clerk of the said Court at 111 Centre Street in the County of New York City and State of New York, within the time provided by law as noted below and to file your answer to the complaint with the Clerk: upon your failure to answer, judgment will be taken against you for the sum of $23,024.90 with interest thereon from the 27th day of January 1984 together with the costs of this action.

Dated: New York, New York, July 18, 1985

DONOVAN, MALOOF, WALSH & KENNEDY
Attorney(s) for Plaintiff(s)
Post Office and Telephone Number
161 William Street, New York, New York 10038
(212) 964-3553

Defendant's Address
9 Rockefeller Plaza
New York, New York

NOTE: the law provides that: (a) If this summons is served by its delivery to you personally within the City of New York, you must appear and answer within TWENTY days after such service; or (b) If this summons is served by delivery to any person other than you personally, or is served outside the City of New

York, or by publication, or by any means other than personal delivery to you within the City of New York, you are allowed THIRTY days after the proof of service thereof is filed with the Clerk of this Court within which to appear and answer.

INDORSED COMPLAINT

A statement of the nature and substance of the plaintiff's cause of action is as follows:

Action to recover $23,024.90 for non-delivery of two pallets of leather goods shipped with defendant common carrier from Argentina to New York under its master air waybill number 044-2400 2543 and house air waybill number 4939. Plaintiff has been damaged in the foregoing amount which amount, although duly demanded, has not been paid.

DONOVAN, MALOOF, WALSH & KENNEDY
Attorney(s) for Plaintiff

APPENDIX L

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

MARO LEATHER CO.,
Plaintiff, ANSWER
-against-
AEROLINEAS ARGENTINAS,
Defendant. Index No. 48027/85

Defendant, AEROLINEAS ARGENTINAS, as and for its answer to the complaint of plaintiff served and filed herein, alleges:

1. Defendant denies knowledge or information sufficient to form a belief as to the allegations contained in the Indorsed Complaint.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE DEFENSE

2. That under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board, and/or the Warsaw Convention, defendant has no liability to plaintiffs or to any other person for any loss, damage, or delay unless a written notice of claim concerning such loss, damage, or delay is filed with defendant within the applicable time limit.

3. Upon information and belief, the proper written notice of claim concerning such loss, damage, or delay was not filed with defendant within the applicable time limit.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE

4. Upon information and belief, any damages allegedly suffered by plaintiff herein resulted from the acts and/or omissions of plaintiff and/or certain third parties who were plaintiff's agents, servants, and/or employees and under plaintiff's control, and for whose conduct the defendant is not responsible.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE

5. The contract of carriage embarked upon herein was in international and/or interstate transportation and as such was

governed, controlled, and made subject to all the terms and provisions of defendant's tariffs on file with the United States Civil Aeronautics Board, and/or the Warsaw Convention.

6. Under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff nor to any other person for any loss, damage, or delay, unless the loss, damage, or delay is shown to have resulted from the negligence of defendant.

7. Upon information and belief, defendant is not guilty of any negligence and has taken all necessary measures to avoid any loss, damage, or delay under the contract of carriage.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

8. Under the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff or to any other person under the contract of carriage for any loss, damage, or delay where such loss, damage, or delay is shown to have been caused by or contributed to by the negligence or fault of plaintiff or his agents, servants, or employees.

9. Upon information and belief, any loss, damage, or delay was caused by or contributed to by plaintiff or his agents, servants, or employees.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE DEFENSE

10. Under the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, defendant has no liability to plaintiff or to any other person under the contract of carriage for any consequential and/or special damages arising out of, or in any way connected with the loss, damage, or delay under the contract of carriage.

11. Upon information and belief, the damages allegedly suffered by plaintiff herein are of a consequential and/or special nature.

AS AND FOR A SIXTH COMPLETE AFFIRMATIVE DEFENSE

12. Defendant performed each and every obligation and duty required or it under the contract of carriage in a reasonable

and proper manner and delivered the shipment to a designated party who was an agent, servant, or employee of plaintiff at the point of destination that plaintiff requested said shipment to be delivered to, in the same order and condition it received the same.

13. By reason, thereof, defendant is not responsible to plaintiff nor to any other parties for the loss or damage allegedly sustained.

AS AND FOR A SEVENTH PARTIAL AFFIRMATIVE DEFENSE

14. Under the terms of the contract of carriage, the applicable provisions of defendant's tariffs on file with the United States Civil Aeronautics Board and/or the Warsaw Convention, the liability, if any, of defendant for any loss, damage, or delay is limited.

Dated: New York, New York
September 3, 1985

Walsh and Levine
Attorneys for Defendant
Aerolineas Argentinas
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New York, New York 10017
(212) 889-8450

To: Donovan, Maloof, Walsh & Kennedy
Attorneys for Plaintiff
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